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12 **SERVICES, INC; BANK OF AMERICA; MORTGAGE**  
13 **ELECTRONIC REGISTRATION SERVICES, INC.; LA SALLE**  
14 **BANK NATIONAL ASSOCIATION**

15 **UNITED STATES DISTRICT COURT**  
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 **HERMAN Q. CHRISTOPHER,**  
18 **DESHAWN REILLY, individuals, as ,**

19 **Plaintiffs,**

20 **v.**

21 **FIRST FRANKLIN FINANCIAL**  
22 **CORPORATION, a Delaware**  
23 **Corporation; LASALLE BANK, N.A.;**  
24 **MERRILL LYNCH MORTGAGE**  
25 **LOAN TRUST 2007-4, Mortgage**  
26 **Loan Asset-Backed Certificates,**  
27 **Series 2007-4 , Its Successors and/or**  
28 **Assigns; BANK OF AMERICA, N.A.**  
**a Delaware corporation; MERSCORP,**  
**INC., a Virginia Corporation,**  
**MORTGAGE ELECTRONIC**  
**REGISTRATION SYSTEMS, INC., a**  
**subsidiary of MERSCORP, Inc., a**  
**Delaware corporation; HOME LOAN**  
**SERVICES, INC.; CAL-WESTERN**  
**RECONVEYANCE CORP; AND**  
**DOES 1 individuals 1 to 100,**  
**Inclusive; and ROES Corporations 1**  
**to 30, Inclusive; and all other persons**  
**and entities unknown claiming any**  
**right, title, estate, lien or interest in the**  
**real property described in the**

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Case No. 10-CV-0017 DMS CAB

**DEFENDANTS FIRST FRANKLIN**  
**FINANCIAL CORPORATION;**  
**HOME LOAN SERVICES, INC;**  
**BANK OF AMERICA; MORTGAGE**  
**ELECTRONIC REGISTRATION**  
**SERVICES, INC's MEMORANDUM**  
**OF POINTS AND AUTHORITIES IN**  
**SUPPORT OF MOTIONS TO**  
**DISMISS AND STRIKE PLAINTIFF'S**  
**AMENDED COMPLAINT**

**Date: August 6, 2010**  
**Time: 1:30 p.m.**  
**Place: Dept. 10**

Trial Date: None

1 Complaint adverse to Plaintiff's  
2 ownership, or any cloud upon  
3 Plaintiff's title thereto,  
4 Defendants.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiffs have been given two opportunities to properly plead an operative complaint. The equitable relief causes of action (1,2,3 and 5<sup>th</sup> causes of action) to set aside the foreclosure sale are not accompanied by allegations of tender. These claims further rely on the argument that the original promissory note was not in the possession of the foreclosing parties. This court, in its order granting Defendants' motion to dismiss the FAC, specifically addressed the applicability of tender and possession of the original note (Request for Judicial Notice "RFJN," **Exhibit 1**). Plaintiffs appear to have ignored this court's previous order.

The SAC now further inserts claims for unjust enrichment and accounting that fail as a matter of law. Plaintiffs continue to waste the judicial resources of this court by filing meritless claims. Plaintiffs had three opportunities to plead one viable claim and have still failed to do so. The court should grant the motion to dismiss with prejudice.

### II. SUMMARY OF ALLEGATIONS

The parcel of real property at issue in this lawsuit is located at 10621 Birch Bluff Ave., San Diego, CA. 92131 ("Subject Property"). This action arises from a first deed of trust securing a loan on the Subject Property for an amount of \$1,200,000.00 ("Subject Loan," SAC, **Exhibit C**) obtained in April 2007. Plaintiffs admit that a mere two months later in June 2007, plaintiff CHRISTOPHER defaulted on the Subject Loan (SAC, ¶15). Plaintiffs admits that Plaintiff CHRISTOPHER no longer has an interest in the Subject Property as of July 2007 (SAC, ¶ 2, **Exhibit B**) Plaintiffs then admit that two assignments of the deed of trust were recorded: 1) an Assignment of the Deed of Trust (securing the Subject Loan) dated August 31, 2007 from MERS to FFFC; and 2) an Assignment of the Deed of Trust (securing the Subject Loan) dated March 3, 2008 from FFFC to La Salle (SAC, ¶17-18, **Exhibits D and E**).

1 Plaintiffs base all causes of action on the premises that: 1) the assignments  
 2 were somehow erroneous (SAC, ¶19-20); 2) The foreclosing Defendants were not  
 3 the owners of the promissory note underlying the Subject Loan (SAC, ¶ 31); and 3)  
 4 Defendants have violated an unknown “pooling and service agreement” (SAC, ¶27-  
 5 29). Based on such allegations, all claims in the SAC should be dismissed with  
 6 prejudice.

### 7 **III. MOTION TO DISMISS**

8 Plaintiffs have completely failed to state a claim for relief against any of the  
 9 Defendants herein.

#### 10 **A. Standard of Review**

11 A motion to dismiss under Federal Rules of Civil Procedure, Rule  
 12 12(b)(6) may be granted where the court determines that even if the facts alleged are  
 13 true, plaintiff would not be entitled to any relief. DeLaCruz v. Tormey, 582 F.2d 45,  
 14 48 (9<sup>th</sup> Cir. 1978). “A complaint must contain either direct or inferential allegations  
 15 respecting all the material elements to sustain a recovery under *some* viable legal  
 16 theory.” Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6<sup>th</sup> Cir.  
 17 1988). While the court will assume that all factual allegations in the complaint are  
 18 true and construe them in a light most favorable to Plaintiff, the court is not required  
 19 to accept “legal conclusions” if those conclusions cannot reasonably be drawn from  
 20 the alleged facts. Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (9<sup>th</sup> Cir.  
 21 1994).

22 The factual allegations in a complaint “must be enough to raise a right to relief  
 23 above speculative level” and “must contain something more ...than... the statement  
 24 of facts that merely creates a suspicion [of] a legally cognizable right of action.”  
 25 Bell Atlantic Corporation v. Twombly (2007) 550 U.S. 544, *citing* Papasan v.  
 26 Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). Further, it is  
 27 improper for a court to assume that the plaintiff can prove facts that have not been  
 28 alleged or that the defendants have violated laws in ways that have not been alleged.

1 Brown v. Rumsfeld 211 F.R.D. 601, 604 (N.D. Cal. 2002), *citing* Associated General  
 2 Contractors of CA, Inc. v. CA State of Carpenters, 459 U.S. 519, 526 (1983).

3 **B. The Underlying Premises of the SAC are Flawed and Thus There is**  
 4 **No Basis to Allege the Equitable Claims in the SAC**

5 Plaintiffs rely on the arguments that the assignments of the deed of trust were  
 6 somehow erroneous (SAC, ¶19-20), the foreclosing Defendants were not the owners  
 7 of the promissory note underlying the Subject Loan (SAC, ¶ 31) and Defendants  
 8 have violated an unknown “pooling and service agreement” (SAC, ¶27-29). The  
 9 first, second, third and fifth claims for relief to set aside the sale, cancel the trustee’s  
 10 deed upon sale, quiet title and declaratory relief, respectively, therefore fail as a  
 11 matter of law.

12 **1. A Deed of Trust Does Not Need to be Assigned in Order for**  
 13 **Defendants to Foreclose**

14 California law does not require that an assignment of deed of trust be recorded  
 15 for a foreclosure to occur. Under California Civil Code section 2924(a)(1), a  
 16 “trustee, mortgagee or beneficiary or any of their authorized agents” may conduct the  
 17 foreclosure process. Civil Code section 2924b(4), states that a: “person authorized to  
 18 record the notice of default or the notice of sale” includes “an agent for the  
 19 mortgagee or beneficiary, an agent of the named trustee, any person designated in an  
 20 executed substitution of trustee, or an agent of that substituted trustee.” “Upon  
 21 default by the trustor, the beneficiary may declare a default and proceed with a non-  
 22 judicial foreclosure sale.” Moeller v. Lien (1994) 25 Cal.App.4th 822, 830, 834.  
 23 Nothing in the comprehensive foreclosure statutory framework required an  
 24 assignment to be recorded. In Poe v. Francis (1933) 132 Cal.App. 330 , the Court  
 25 rejected the contention that the lack of assignment of a deed of trust (much less the  
 26 lack of a recorded assignment) rendered the assigned obligation unenforceable. The  
 27 Poe court noted: “On the point that there was no assignment of the trust deed after  
 28 assignment of the note, we consider the assignment of the note sufficiently

1 transferred the chose....” (Id. at 336, citations omitted).

2 U.S. District Courts have also come to the same conclusion. Recently, the  
3 USDC, Northern District of California held that Civil Code section 2932.5 does **not**  
4 apply to a deed of trust. Roque v. Suntrust Mortg., Inc. 2010 WL 546896  
5 (N.D.Cal.,2010). In Roque, US District Court Judge Ronald M. Whyte held that  
6 section 2932.5 (for recording assignments) only applies to the trustee, as the power  
7 of sale under a deed of trust is held by the foreclosure trustee, not the beneficiary.

8 While nothing required an assignment of the deed of trust be recorded in this  
9 case, the assignments were duly recorded in this matter (SAC, **Exhibits D and E**).  
10 To maneuver around this, plaintiffs attempt to argue that the assignments were “out  
11 of order” despite the fact that the recording of the assignments clearly indicate  
12 otherwise. (SAC, ¶19). Plaintiff can cite no law requiring that the Assignment be  
13 recorded in order for the foreclosure to go forward.

14 Further, under Civil Code section 2934a(b), the Substitution of Trustee may  
15 be recorded **after** the NOD records. In the recent case of Reynoso v. Paul Financial,  
16 LLC 2009 WL 3822298 at \*3 (N.D.Ca. 2009), US District Court Judge Samuel  
17 Conti addressed the very issue of the timing of the recording of the substitution of  
18 trustee. In Reynoso, the substitution of trustee recorded after the NOD. Judge Conti  
19 held that Civil Code section 2934a permitted the post-NOD recording. Thus, the  
20 substituted trustee held the power of sale to proceed with the foreclosure. (Id.).  
21 Here, Defendants duly recorded a substitution of trustee prior to the trustee’s sale on  
22 the Subject Property (RFJN, **Exhibit 2**).

## 23 **2. Defendants Do Not Need to Possess the Original Note to** 24 **Foreclose**

25 Plaintiffs again attempt to argue that since none of the Defendants possess the  
26 original promissory note underlying the Subject Loan, the parties had no authority to  
27 foreclose (SAC, ¶26). District Courts all across California have rejected this  
28 argument. (Harrington v. Home Capital Funding, Inc. 2009 WL 514254 (SD. Ca.

Mar. 2, 2009); Hernandez v. California Reconveyance Co. 2009 WL 464462 (ED.Cal. Feb. 24, 2009); Sicaros v. NDEX West, LLC 2009 WL 385855 (SD.Cal. Feb. 13, 2009); Hernandez v. Reconstruct Company 2009 WL 250005 \*1, \*2 (SD Cal. Feb. 2, 2009); Carbajal v. Five Star Services, LLC 2009 WL 249795 (SD.Cal. Feb. 2, 2009); Candelo v. NDEX West, LLC 2008 WL 5382259 (ED.Cal. Dec. 23, 2008).

This court further noted the inapplicability of this argument to support any claims for relief in its order granting the motion to dismiss the FAC (RFJN, **Exhibit 1**, page 4, lines 11-21). This allegation does not support any claims for relief.

### 3. The Allegation that Defendants Violated “Pooling and Servicing Agreements” are Unintelligible

Plaintiffs further allege that Defendants have violated unknown “pooling and servicing agreements.” Apparently, only “depositors of promissory notes” must comply with these alleged agreements (SAC, ¶27). Thus, plaintiffs not only fail to identify what the terms of these agreements are, plaintiffs further fail to allege how a violation of these “agreements” would entitle plaintiffs to any relief. Plaintiffs do not appear to be a third party beneficiary or in any way have the ability to enforce the terms of such “agreements.”

Thus, the basic premises of the SAC are severely flawed and do not support any claim for relief alleged in the SAC.

### C. Plaintiffs’ Failure to Properly Allege Tender is Fatal to All Equitable Causes of Action in the SAC<sup>2</sup>

It is well established that before a borrower can bring a cause of action to challenge a foreclosure, the borrower must pay the entire loan amount prior to the sale. U.S. Cold Storage of CA v. Great Western Savings & Loan Ass’n, (1985), 165

<sup>2</sup> This Section is directed at the first, second, third and fifth claims for relief in the SAC.

Cal.App.3d 1114, 1222. Thus, to challenge the foreclosure sale, a “valid and viable tender of payment of indebtedness” is an essential element of the action. FPCI RE-HAB 01 v. E & G Investments, Ltd., (1989) 207 Cal.App.3d 1018, 1021; Karlsen v. American Savings & Loan Association (1971) 15 Cal.App.3d 112, 116; Arnolds Management Corp. v. Eischen (1984) 158 Cal.App.3d 575, 577-579.

In ruling on the previous motion to dismiss the FAC, the court noted on its order that tender is indeed essential to an action to set aside a foreclosure sale (See RFJN, **Exhibit 1**, page 4, line 2, Section A, lines 2-7). Although each of the claims challenges the foreclosure sale, the *verified SAC completely fails to provide one allegation of tender*. Furthermore, plaintiffs admit that the defaulted on the Subject Loan two months after the Subject Loan was obtained (SAC, ¶15). There is not one allegation plaintiffs made any attempts to even offer to provide valid tender. Due to this fatal defect, the court should dismiss with prejudice these four claims for relief on this basis alone.

**D. Plaintiffs Allege No Facts to Support an Accounting Claim**

Plaintiffs allege that they are entitled to an “accounting” because the amount of money owed to defendants is “unknown” (SAC, ¶61). An accounting claim can be alleged only where a fiduciary relationship exists between the parties; where no such relationship exists, an accounting is appropriate only if the accounts are so complicated that ordinary legal action demanding a fixed sum is impractical. 5 Witkin, California Procedure (4<sup>th</sup> Edition) Section 776, p. 233; St. James Church of Quiet Holiness v. Superior Court (1955) 135 Cal.App.2d 352, 359.

Plaintiffs cannot state a claim for accounting. There is no alleged fiduciary relationship between Plaintiffs and Defendants. Further, Plaintiffs do not allege that the accounts are “complicated” or in any way difficult for an “ordinary legal action” to ascertain the demanded sum. Plaintiffs admit they defaulted on the Subject Loan in June 2007. Any amount owed is easily ascertainable and computable without a claim for accounting (i.e., Notice of Default and Notice of Sale lists the amount

owed; See SAC, **Exhibits F and G**). Accordingly, this court should dismiss this claim with prejudice.

**E. Plaintiffs' Claim for Unjust Enrichment Does Not Allege an Inadequate Remedy at Law**

In a claim for unjust enrichment, Plaintiffs are actually asking for restitution. A claim for restitution cannot be asserted unless there is an inadequate remedy at law. Allen v. Powell (1967) 248 Cal.App.2d 502, 509. Further, an individual is required to make restitution if he or she is *unjustly* enriched at the expense of another.” McBride v. Boughton (2004), 123 Cal. App. 4th 379, 389; California Federal Bank. V. Matreyek (1992), 8 Cal. App. 4<sup>th</sup> 125, 131. The fact that a person receives benefits from another “is not, by itself, sufficient to require restitution.” Id. A defendant is only required to make restitution if the enrichment is *unjust*. Id.; Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal.App.3d 737, 748.

Plaintiffs fail to allege how any of the Defendants have been unjustly enriched. Plaintiff provides boilerplate allegations that “Defendants” obtained “insurance reimbursements” from unknown insurance policies (SAC ¶50). How this alleged benefit is unjust is unclear when plaintiffs admit that they defaulted on the Subject Loan two months after the Subject Loan was obtained. Again, plaintiffs must allege that Defendants were *unjustly* enriched rather than merely obtaining compensation. Furthermore, plaintiffs do not allege that damages or their equitable relief claims would be inadequate remedies at law.

**IV. MOTION TO STRIKE**

Defendants further move this Court for an order to strike plaintiff CHRISTOPHER from the SAC.

**A. Standard of Review**

A party may move to strike any “insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” FRCP 12(f). A motion to strike avoids “the expenditure of time and money that will arise from litigating ‘spurious

issues' by eliminating those issues prior to trial." Taylor v. Quall, 471 F.Supp.2d 1053, 1058-1059 (C.D.Cal. 2007.). In considering a motion to strike, courts generally apply the same test used to determine a motion to dismiss under FRCP Rule 12(b)(6). Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9<sup>th</sup> Cir. 1993), *rev'd on other grounds*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). Accordingly, the basis for the motion to strike must appear on the face of the pleading or from matters which the court may take judicial notice. Montecino v. Spherion Corp., 7 F.Supp.2d 965, 967 (C.D.Cal. 2006); SEC v. Sands, 902 F.Supp. 1149, 1165 (C.D.Cal. 1995). The federal courts also have the authority to strike the prayer for relief where the damages sought are not recoverable as a matter of law. Tapley v. Lockwood Green Engineers, Inc., 502 F.2d 559, 560 (8th Cir. 1974); Bureerong v. Uvawas, 922 F.Supp.1450, 1479, fn. 34 (C.D.Ca l.1996).

**B. PLAINTIFF CHRISTOPHER IS NOT A PROPER PLAINTIFF TO THE SAC**

Plaintiffs admit in the SAC that Plaintiff CHRISTOPHER conveyed the entire interest in the Subject Property to Plaintiff DBR Strategies, Inc. in July 2007 (SAC, ¶16). The SAC is only verified by Plaintiff DBR Strategies, Inc. and not Plaintiff CHRISTOPHER. Plaintiff CHRISTOPHER has no interest in the Subject Property since July 2007 and each and every single claim in the SAC involves alleged conduct that occurred after 2007 (i.e., assignments of interests recorded from August 2007 and after, foreclosure process in 2007-2008). Thus, even if all the SAC allegations are true, plaintiff CHRISTOPHER would have no standing to obtain relief against any of the Defendants based on the allegations in the SAC.

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1 **V. CONCLUSION**

2 Based on the foregoing, Defendants requests this Court grant their motion to  
3 dismiss with prejudice. Should any portion of the motion to dismiss be overruled,  
4 Defendants request that plaintiff CHRISTOPHER be stricken from the SAC without  
5 leave to amend.

6 DATED: June 7, 2010

WOLFE & WYMAN LLP

By: /s/ Andrew A. Bao

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ANDREW A. BAO

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